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No. 830

In the Supreme Court of the United States

OCTOBER TERM, 1941

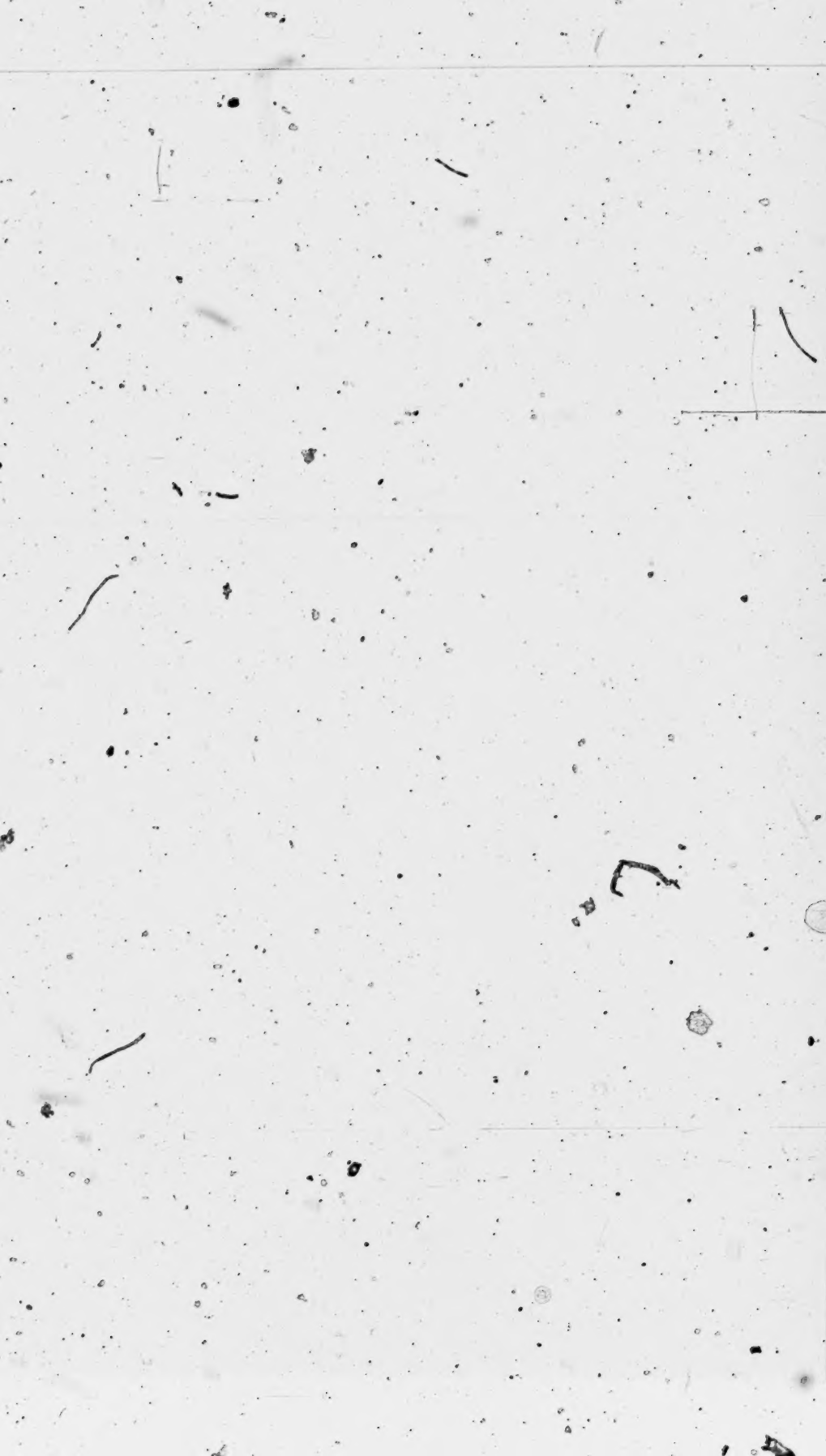
THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES



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OPINION BELOW

The opinions of the Court of Claims are not yet reported. They appear at pages 8 and 9 of the Record.

JURISDICTION

The judgment of the Court of Claims was entered on May 5, 1941 (R. 9–10). A motion by petitioner for new trial was denied by the court on October 6, 1941 (R. 10). The petition for certiorari was filed December 31, 1941. The jurisdiction of this Court is invoked under section 3 of the Act of February 13, 1925, 43 Stat. 936, 939,

as amended by the Act of May 22, 1939, 53 Stat. 752.

QUESTION PRESENTED

Whether the United States has taken from the Seminole Nation part of the lands granted by the Government to the Nation in Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, and must therefore make compensation to the Seminoles under the rule of *United States* v. *Creek Nation*, 295 U. S. 103.

STATUTES INVOLVED

The relevant statutory and treaty provisions are set forth in the Appendix, *infra*, pp. 10–11.

STATEMENT

By Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, the United States granted to the Seminole Nation a tract of land, situated between two streams, which should be bounded on the east by the western limit of the territory of the Creek Nation (a boundary then undetermined) and on the west by a line drawn at such a distance from the eastern boundary that the tract would comprise 200,000 acres. Late in 1866, before the boundaries of the Seminole domain had been located, the Seminole Indians moved to what was assumed to be the granted tract (R. 7).

In 1868 the Commissioner of Indian Affairs directed one Rankin to survey the Creek-Semi-

nole boundary (R. 17); Pet. Br., *The Seminole Nation* v. *The United States,* No. 348, this Term, p. 43). When this dividing line had been surveyed those Seminoles who had settled to the east moved west of the Rankin line (R. 17). After the Creeks had objected that the Seminole eastern boundary should have been located farther to the west, one Bardwell in 1871 resurveyed the dividing line, fixing it several miles west of the Rankin line; Bardwell's survey was approved by the Secretary of the Interior on February 5, 1872 (R. 7). Two months following Bardwell's survey the Government directed one Robbins to run the western boundary of the Seminole territory, so as to include 200,000 acres from the eastern boundary (R. 7). This survey also was approved by the Secretary of the Interior on February 5, 1872 (R. 7).

Bardwell's survey had disclosed that a considerable area east of the Seminole-Creek dividing line had been occupied by Seminoles, who had made substantial improvements on this land. In order that the Seminoles might retain the lands which they had improved, Congress authorized the Secretary of the Interior to negotiate with the Creeks for the purchase of these lands. Act of March 3, 1873, 17 Stat. 626. On February 14, 1881, the Secretary entered into an agreement with the Creeks whereby the latter nation ceded to the United States land east of the Bardwell

line, the agreement providing that the eastern boundary of the land ceded should be so drawn that the tract would aggregate 175,000 acres. See *Creek Nation* v. *United States,* 93 C. Cls. 561, 566.[1] The United States paid the Creeks $175,000 for this tract. Act of August 5, 1882, 22 Stat. 257, 265 (appropriation). The land thus ceded became a part of the Seminole reservation and was disposed of either by allotment to members of the tribe or by sale for account of the tribe. Record, *The Seminole Nation* v. *The United States,* No. 348, this Term, pp. 16–17.

By Article I of the Treaty of February 27, 1867, 15 Stat. 531, the United States agreed that a delegation from the Pottawatomie Tribe of Indians should accompany a government commission to the Indian country—

> * * * in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the In-

[1] Later the Creeks claimed that the tract comprised more than 175,000 acres, and sued to recover compensation for the excess, alleging it to be 2,397.71 acres. The Court of Claims found that it was 1,198.99 acres, but denied recovery because the Creeks had intended to convey the whole tract for the consideration of $175,000 and because cession of the whole was ratified by an agreement of January 19, 1889, 25 Stat. 757. *Creek Nation* v. *United States,* 93 C. Cls. 561, 570–571.

> terior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation: * * *

The Pottawatomie Tribe selected lands immediately west of the Seminole domain (as determined by the Robbins line) (Pet. 7); these were set aside for the purpose by the Secretary of the Interior on November 9, 1870, and were occupied by the Indians in 1872 (R. 3). Subsequently, the United States allotted and patented the lands to the Pottawatomies in severalty or sold and patented them to settlers under the homestead laws (R. 7).

By 1900 it appeared that there might be a shortage in the area of Seminole territory originally intended to be enclosed between the Bardwell and Robbins lines (R. 21–22). In an amended petition filed in the Court of Claims in the present proceedings in 1937 the Seminole Nation alleged that owing to an error in location of the Robbins line the tract was 11,550.54 acres short of 200,000 acres, and that the United States had taken from the Seminoles 11,550.54 acres west of the Robbins line when the Government patented that land to individuals in 1891 and after;

petitioner then prayed judgment against the United States for the value at the time of taking of the 11,550.54 acres, with interest at 5 per centum per annum (R. 3–5). The United States filed a general traverse to the petition and asked that it be dismissed (R. 5). The Court of Claims made no finding whether a shortage in fact existed in the tract between the Robbins and Bardwell lines (R. 7), but held that in any event the Seminole Nation had been more than compensated for the alleged shortage by the Government's purchase in 1882 for the Seminoles of over 175,000 acres ceded by the Creek Nation (R. 8–9). The court also stated (R. 9) that even if petitioner were entitled to recover for the taking of a part of the 200,000-acre tract originally agreed upon the Government would be entitled to offset the value of the additional land east of the Bardwell line which the Seminoles received in 1882 as a gratuity under Section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596. The petition was accordingly ordered dismissed on May 5, 1941 (R. 9–10). Petitioner's subsequent motion for a new trial, filed July 10, 1941, was overruled on October 6, 1941 (R. 10). The petition for certiorari was filed December 31, 1941.[2]

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[2] During the trial in the Court of Claims a new survey was undertaken by Arthur D. Kidder pursuant to instructions of the General Land Office (R. 10). Kidder concluded in his report that a shortage of 10,351.82 acres existed in the Seminole tract west of the Bardwell line (R. 16). Correspond-

DISCUSSION

The Government does not oppose the granting of the petition for certiorari in this case because the claim presented and defenses interposed against it are involved as an issue in a kindred case in which this Court has authorized review, *The Seminole Nation* v. *The United States*, No. 348, this Term, certiorari granted, October 13, 1941.

There the Seminole Nation filed a petition in the Court of Claims to recover upon claims other than the one here presented. In addition to contesting those claims, the Government advanced a number of items as gratuity offsets under Section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596. Among these it included a claim for gratuity offset based on the purchase by the United States for the Seminoles from the Creek Nation in 1882 of the approximately 175,000 acres of land which lie between the Bardwell line and present Creek Territory. The Court of Claims found (93 C. Cls. 500, 511) that the United States had expended $177,397.71 for this land.[3] The

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ingly, in the petition for certiorari petitioner has limited its claim for compensation to the value of 10,351.82 acres at the time of the alleged taking (Pet. 4, 9, 12, 13).

[3] In *Creek Nation* v. *United States*, 93 C. Cls. 561, the petitioner had sought to recover compensation from the United States for 2,397.71 acres of land alleged to have been included by mistake in the 175,000-acre tract which the Creeks had ceded to the United States for the Seminoles. The Court there determined the excess to be 1,198.99 acres rather than 2,397.71 acres, but held that no recovery could be

court held (*id.* at 526) that it was a gratuitous expenditure within the provisions of the 1935 statute, deducted $11,550.54 from the $177,397.71 to allow for the shortage alleged by the Seminole Nation to exist in the 200,000-acre tract (valuing the land in each tract at $1 per acre), and allowed to the Government an offset of the difference: $165,847.17.

The Court of Claims in that case examined claims of the Nation totalling $1,153,022.72, and concluded that the United States was liable to the extent of $18,388.30; against that liability the court allowed gratuity offsets of $705,337.33 (93 C. Cls. 537). In this Court the Seminole Nation challenges the action of the Court of Claims in denying the remaining claims and in allowing certain items as gratuity offsets (including the $165,847.17 for the land given to the Seminoles in 1882).

Because of the connection between the question in the present case and that concerning the related gratuity offset in *The Seminole Nation* v. *The United States*, No. 348, this Term, the Government does not oppose the granting of certiorari herein. In the event that the writ is granted, the Govern-

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allowed. See n. 1, p. 4, *supra*. The Court of Claims probably arrived at the figure of $177,397.71 in the present case by adopting inadvertently the allegations of the Creek Nation's petition concerning the excess of acreage and by assuming that the Government paid $1 per acre for 177,397.71 acres. Cf. n. 1, p. 4, *supra*. As stated at page 4, *supra*, the United States expended $175,000 for the tract.

ment suggests that the two cases be set down for argument consecutively on the docket.

Respectfully submitted.

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FEBRUARY 1942.

APPENDIX

Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, between the United States and the Seminole Nation provides, in part:

> * * * The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. * * *

Article I of the Treaty of February 27, 1867, 15 Stat. 531, between the United States and the Pottawatomie Tribe of Indians provides, in part:

> It being the intention of the government that a commission shall visit the Indian country as soon as practicable after the ratification of the treaties contemplating the removal of certain tribes from Kansas,

accompanied by delegates from the several tribes proposing to remove, it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation: * * *

Section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596, provides, in part:

> In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948